STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 30, 2010
v	No. 292318 Kalamazoo Circuit Court
WILLIE OTIS WASHINGTON, Defendant-Appellant.	LC No. 2008-002003-FC

Before: HOEKSTRA, P.J., and FITZGERALD and STEPHENS, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of four counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a) (person under 13 years of age). Defendant was sentenced on each count to concurrent terms of 35 to 60 years' imprisonment. We affirm.

I. BASIC FACTS

The charges in the instant case stem from defendant's separate sexual assaults of twin sisters who briefly lived in his home with their mother during the summer of 2001. Each victim testified that defendant assaulted her on an almost nightly basis in the upstairs area of the home where the girls slept. In addition, each victim testified that on one occasion defendant assaulted her in the lower level of the home; one twin reported an incident that occurred in the bathroom, and the other twin reported an incident that occurred in the living room. Neither victim was aware that the other twin was also being abused.

II. INEFFECTIVE ASSISTANCE

Defendant first argues that he was denied the effective assistance of counsel when trial counsel approved a general unanimity instruction, especially in light of indications that the jury was confused on this point. We disagree.

Claims of instructional error are reviewed de novo. *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005). To establish ineffective assistance of counsel during trial, a defendant must show that his trial counsel's representation fell below an objective standard of reasonableness under prevailing professional norms; that but for his counsel's errors, there is a reasonable probability that the results of the trial would have been different; and that the

proceedings were fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Our review is limited to errors apparent on the record because no evidentiary hearing was held below. *People v Scott*, 275 Mich App 521, 526; 739 NW2d 702 (2007).

People v Cooks, 446 Mich 503; 521 NW2d 275 (1994), is applicable and dispositive on this issue. In *Cooks*, our Supreme Court concluded that:

> when the state offers evidence of multiple acts by a defendant, each of which would satisfy the actus reus element of a single charged offense, the trial court is required to instruct the jury that it must unanimously agree on the same specific act if the acts are materially distinct or if there is reason to believe the jurors may be confused or disagree about the factual basis of the defendant's guilt. When neither of these factors is present, . . . a general instruction to the jury that its verdict must be unanimous does not deprive the defendant of his right to a unanimous verdict. [*Id*. at 530.]

In reaching the conclusion that a specific unanimity instruction was not required, the *Cooks* Court considered that "the evidence offered to support each of the alleged acts of penetration was materially identical," specifically noting that the victim's testimony in that case involved similar acts that occurred in the same general location over an unspecified but identifiable time period. Id. at 528. The *Cooks* Court held "the multiple acts" were "tantamount to a continuous course of conduct." *Id*. In addition, the Court noted the defendant in *Cooks* "did not present a separate defense or materially distinct evidence of impeachment regarding any particular act." *Id*. Accordingly, "the sole task of the jury was to determine the credibility of the victim with respect to the pattern of alleged conduct." *Id*.

The present case is substantially similar to that of *Cooks*. Here, each victim provided unequivocal testimony of multiple instances of vaginal penetration by defendant's penis, occurring in the same house over an unspecified period in the summer of 2001. Although defense counsel made arguments and questioned witnesses at trial in such a way as to attempt to poke holes through the prosecutor's case, no witnesses were presented to specifically impeach the victims' respective version of events. Instead, defendant merely denied the existence of any inappropriate behavior involving sexual penetration. Hence, just as the Michigan Supreme Court in *Cooks* specifically found that the location of the various acts and the impeachment testimony did not "*materially* distinguish any of the separate acts," we conclude that even where the acts in the present case occurred in different locations and defendant sought to show inconsistencies in, and reasons to question, the victims' testimony, this does not *materially* distinguish any of the separate acts. *Id*. at 528 n 31.

Further, we reject defendant's argument that a specific unanimity instruction was necessary given the fact that the jury requested clarification of its instructions during deliberations. We conclude that any juror confusion that was demonstrated in this case related solely to whether there needed to be agreement on the location of each specific act, which was not pertinent to a finding that the acts occurred. There is no evidence that the jurors' disagreed about the factual basis that needed to be proved beyond a reasonable doubt in determining defendant's guilt. Thus, there was no need for a specific unanimity instruction. *Cooks*, 446 Mich at 528. Rather, our review of the record demonstrates the trial court provided sufficient

direction to the jury when it presented the general jury instructions and reviewed the verdict form, repeatedly indicating that the four charges were "separate crimes" and "different offense[s]," which the jury "must consider separately in light of all the evidence." Ultimately, we find the instructions did not deprive defendant of his right to a unanimous verdict. *Id*. at 530. Consequently, defense counsel's representation did not fall below an objective standard of reasonableness because counsel is not required to make an objection that would be futile. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002); *Rodgers*, 248 Mich App at 702.

III. PROSECUTORIAL MISCONDUCT

Defendant also argues that the prosecutor engaged in deliberate misconduct during cross-examination when defendant was repeatedly asked to give his opinion on the accuracy or credibility of the prosecution's witnesses' testimony and to comment on the potential reasons why the witnesses would fabricate their testimony. Defendant alternatively argues his trial counsel was ineffective for failing to object to this line of questioning. We disagree.

We review defendant's unpreserved claims of prosecutorial misconduct for plain error affecting his substantial rights. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004). Issues of prosecutorial misconduct are reviewed "on a case-by-case basis by examining the record and evaluating the remarks in context." *Id.* at 454. A defendant's conviction will ultimately be reversed only if it is determined that the defendant is actually innocent or the error "seriously affected the fairness, integrity, or public reputation of judicial proceedings," regardless of his innocence. *People v Ackerman*, 257 Mich App 434, 448-449; 669 NW2d 818 (2003). Error requiring reversal will not be found where a curative instruction could have alleviated any prejudicial effect." *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). "Curative instructions are sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements and jurors are presumed to follow their instructions." *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008) (citations omitted).

It is improper for a prosecutor to ask a defendant to comment on the credibility of the prosecution's witnesses. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). However, prosecutors are generally accorded "great latitude" regarding their arguments and conduct during trial. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). In addition, a defendant "cannot complain of admission of testimony which defendant invited or instigated." *People v Whetstone*, 119 Mich App 546, 554; 326 NW2d 552 (1982). Thus, even where a prosecutor's comments standing alone may seem improper, those comments may not constitute error requiring reversal if the comments were made in response to issues raised by defendant. See *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977).

In this case, the prosecutor asked defendant during cross-examination whether the prosecution's witnesses were lying. At first glance, this appears to be an impermissible inquiry. However, our review of the record demonstrates that defendant himself initially raised the issue of witness credibility during his direct examination. Based on defendant's testimony, it is apparent that his theory of the case was that the victims and a child protective services worker were biased and were liars. Hence, the prosecutor's questions to defendant about the prosecution's witnesses' credibility were responsive to defendant's own statements. Accordingly, when reviewed in context, the prosecutor's questions do not constitute error requiring reversal. *Duncan*, 402 Mich at 16; *Whetstone*, 119 Mich App at 554. Moreover,

defendant could have halted the prosecutor's questions with a timely objection and requested a curative instruction, thereby alleviating any prejudice. *Unger*, 278 Mich App at 235. In any event, the trial court instructed the jury that it alone was authorized to determine the credibility of the witnesses who were presented at trial. Thus, any prejudice to defendant that may have resulted from the prosecutor's questions would have been cured. *Unger*, 278 Mich App at 235.

Further, we find it difficult to discern how the questions presented by the prosecutor prejudiced defendant. Our Supreme Court has held that a prosecutor's improper request for a defendant to comment on the credibility of other witnesses constitutes harmless error when the defendant handles his response "quite well." *Buckey*, 424 Mich at 17. Here, as in *Buckey*, defendant responded to the prosecution's inquiry by generally providing detailed reasons why he thought that the witnesses were lying and biased. Thus, defendant has failed to establish that he was prejudiced by the prosecutor's questions.

In addition, as noted above, defendant's apparent theory of defense was that the prosecutor's witnesses were biased and lying. Therefore, the prosecutor's questions actually allowed defendant to continue to set forth his theory. See *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001) (it was harmless error for the prosecutor to question defendant as to whether he thought that a witness was a liar where defendant's theory of the case was that other witnesses were lying and conspiring against him). Based on the foregoing, defendant is not entitled to any relief. *Buckey*, 424 Mich at 17.

We likewise reject defendant's alternative argument that he was denied the effective assistance of counsel due to defense counsel's failure to object to the errors alleged above. Because there was no error requiring reversal, counsel did not render ineffective assistance for not objecting to the prosecutor's questions to defendant. *Milstead*, 250 Mich App at 401 (counsel is not required to make a futile objection).

Affirmed.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Cynthia Diane Stephens